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80-1258

No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

WALTER MARKHAM, ET AL
Petitioners

v.

MIRIAM E. GELLER,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a public school system violate the Age Discrimination in Employment Act (ADEA) if it applies a hiring policy which is facially neutral as to age and which provides for the recruiting of less experienced teachers?

   a. Where no discriminatory motive has been alleged but where a facially neutral hiring policy is applied, can an applicant recover damages by showing that the impact of such policy adversely affects the protected age group?

   b. To establish a case of disparate impact of a facially neutral policy, are statistics reflecting the characteristics of a supposedly representative group adequate where actual group statistics are available and where the actual hiring statistics contradict the theoretical statistics?

   c. What degree of disparity is necessary to render impact illegal?

   d. Is salary cost a legitimate consideration for a public employer in selecting among applicants?

2. Is the standard of causation to be applied in cases alleging discrimination: (a) the "one reason" standard; (b) the "one reason that made a difference" standard; or (c) the "determinative factor-but for" standard?

PARTIES

The individual Plaintiff is a teacher who applied for a position with the West Hartford, Connecticut public schools.

The Defendants are the seven members of the West Hartford Board of Education and the Superintendent of Schools, Director of Personnel, Principal and Supervisor of Art. They are named as follows:

Board members Walter Markham, Naomi Vogel, Elizabeth Steven, James Deephouse, Gerald Roisman, Daniel Donovan and Robert Roth; Superintendent Paul R. Burch; Director of Personnel, R. Richard Hedrick; Bugbee School Principal, Leonard E. Johnson; and Supervisor of Art, Sarita R. Rainey.

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REFERENCE TO OPINIONS BELOW

This case having been tried to a jury, Petitioner seeks review of the District Court's instructions to the jury, which the District Court discussed in its Ruling on Defendants' Motion For New Trial, dated December 18, 1979 and reprinted in the Appendix hereto at pp. 1-11 thereof; by way of review of the opinion and judgment of the United States Court of Appeals For the Second Circuit, dated December 8, 1980 and reprinted in the Appendix hereto at pp. 12-30 thereof.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion and judgment on December 8, 1980. Rehearing was not sought, and no extension of time was sought for filing this petition.

Petitioner believes this Court has jurisdiction to review by writ of certiorari under Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

Jurisdiction in the United States District Court, District of Connecticut, was invoked by allegations in the complaint referring to Title 28, U.S.C. Secs. 1331 and 1343 and to Title 29, U.S.C. Sec. 626(c). The latter reference is to part of Title 29, U.S.C. Sec. 621 *et seq.*, the Age Discrimination in Employment Act of 1967, hereinafter referred to as the ADEA.

Respondent Miriam E. Geller was 55 years old when she applied for a position as art teacher in the West Hartford, Connecticut school system in late August or early September, 1976, a position which had opened up less than a week before school was to begin. Mrs. Geller had some 13 years of experience as a teacher in New Jersey and had done some substitute teaching in West Hartford. She was asked to begin teaching as a substitute, which she did. Meanwhile, school officials continued to interview other candidates for the job.

After two weeks of school, Mrs. Geller was informed that another candidate was being awarded the job and Mrs. Geller was terminated. She had never been offered a teaching contract. Thereafter, she filed the present suit claiming discrimination on account of age, pointing in particular to the so-called Sixth Step policy of the school system, which reads as follows:

> "Except in special situations and to the extent possible, teachers needed in West Hartford next year will be recruited at levels below the sixth step of the salary schedule."

Because the school, like most schools, normally recognized experience in other systems, the policy, where strictly applied, would tend to work against applicants with five or more years of teaching experience. At the same time, the school professed to seek and hire the "best qualified" applicants for teaching regardless of

experience. In the case of the art position here involved, the person selected was one of five applicants for the position, who happened to be a "walk-in" applicant (i.e., one who stopped in at the school office on about September 10) but who nonetheless was considered by all three administrators, concurring in their recommendation to the Superintendent of Schools, to be outstanding and more qualified than Mrs. Geller for a permanent position. The successful applicant was 26 years old and had three years of teaching experience.

The Director of Personnel acknowledged that the Sixth Step policy was mentioned to Mrs. Geller at her initial interview with him. However, he flatly denied that it was a factor on September 17 when the decision about the permanent position was made.

Dr. Hunt, an expert witness for Mrs. Geller, testified to the effect that his study and analysis of all existing Connecticut teachers showed that the Sixth Step policy, if applied, would have a discriminatory impact on some 92.6% of teachers over age 40 and this was of extreme statistical significance. Plaintiff's (Respondent's) Exhibit 17, a written summary prepared by Dr. Hunt, showed that the Sixth Step policy would also affect adversely 62.8% of teachers under age 40, and the policy would affect adversely 75% of Connecticut teachers of *all* ages.

Dr. Hunt conceded that a study of actual applicants to the West Hartford school system might produce different results. He also admitted that if in fact the percentage of hires of persons over age 40 by West Hartford compared to all hires remained about the same during the years the policy was supposedly in effect as compared to prior years, then in his opinion "The conclusion is that age is not a factor...[i]n hiring." (Transcript, page 244). Petitioner West Hartford school system later introduced compilations of actual hirings to support Dr. Hunt's opinion that age was not a factor for either pre-policy or policy years (Defendants [Petitioners] Exhibit J). Nonetheless, the trial court instructed the

jury that the Sixth Step policy was age-discriminatory as a matter of law.

The trial court further instructed the jury orally that Mrs. Geller was entitled to recover damages

> "if one factor was her [age] and if it made a difference in determining whether she would be employed... If defendants' decision about Mrs. Geller was made in whole or in part because she was above the fifth step on the salary scale,... Mrs. Geller is entitled to recover..."
>
> (Appendix page 11A)

The trial court also submitted special interrogatories to the jury in writing, the first of which related to causation and in which the judge asked only whether the policy was "one reason" Mrs. Geller was not hired, refusing to add the "made a difference" language he had prescribed in his oral instructions. This course of events is reflected in the following colloquy:

> "THE COURT: I propose to submit some Special Interrogatories.
>
> 1. Was the sixth step guideline one reason for Mrs. Geller not being hired for the permanent art teacher's position at the Bugbee Elementary School? Answer: Yes or No.
>
> MR. POST: Sir, could I ask that that interrogatory track with your charge to the Jury and say, 'One reason that made a difference.'?
>
> THE COURT: No. If it was one reason, that is sufficient.
>
> MR. POST: That made a difference in their decision.
>
> THE COURT: No. If it was one reason."

The written interrogatory was submitted to the jury as proposed by the trial court without the requested modification.

REASONS FOR GRANTING THE WRIT

A. THIS COURT HAS NOT PREVIOUSLY SETTLED IMPORTANT QUESTIONS OF FEDERAL LAW.

I. Does a public school system violate the Age Discrimination in Employment Act (ADEA) if it applies a hiring policy which is facially neutral as to age and which provides for the recruiting of less experienced teachers?

a. Where no discriminatory motive has been alleged but where a facially neutral hiring policy is applied, can an applicant recover damages by showing that the impact of such policy adversely affects the protected age group?

In cases alleging discrimination under the United States Constitution, the United States Supreme Court has held that proof of a discriminatory motive is necessary. *Washington v. Davis*, 426 U.S. 229 (1976). In cases alleging discrimination under the Civil Rights Act, discriminatory motive has been held unnecessary providing a disparate impact can be found. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). There are no United States Supreme Court cases to date indicating whether a discriminatory motive must be alleged and proved under the Age Discrimination in Employment Act (ADEA).

On one hand, the statutory provision against age discrimination is similar to that incorporated in the Civil Rights Act regarding sex and race, etc. This has led the Circuit Court below to decide that a showing of disparate impact on the protected age group allows recovery even if no discriminatory motive is alleged or proved. The Circuit Court adopted the concepts of the cases under the Civil Rights Act. *Griggs v. Duke Power Company*, 401 U.S. 424 (1970); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

On the other hand, this court has recognized that Congress did not merely add age to the provisions of the Civil Rights Act as it had previously inserted the word "sex." *Lorillard v. Pons*, 434 U.S. 575 (1978). Furthermore, courts have noted that age discrimination is different. For example, in *Laugesen v. Anaconda Company*, 510 F.2d 307, 313 (6th Cir. 1975), the court stated in a footnote:

> "The foregoing language suggests that perhaps the most strict approach which is evident in the treatment of a Title VII race discrimination case in *McDonnell Douglas v. Green* may not be desirable here. The progression of age is a universal human process... This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex and national origin. Thus, while the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age."

Finally, this Court has recognized that discrimination cases brought under the United States Constitution require a showing of a discriminatory motive. *Washington v. Davis*, 426 U.S. 229 (1976).

Defendants submit that Certiorari should be granted in order to determine whether or not disparate impact on a protected group can be substituted for a showing of discriminatory motive in a case alleging age discrimination.

b. To establish a case of discriminatory impact of a facially neutral policy, are statistics reflecting the characteristics of a supposedly representative group adequate where actual group statistics are available and where the actual hiring statistics contradict the theoretical statistics?

Supreme Court cases have permitted a plaintiff to recover in discrimination cases if a hiring policy had a disparate impact on the protected group. *Dothard v. Rawlinson*, 434 U.S. 321 (1977). To establish disparate impact, plaintiffs have been permitted to introduce statistics regarding the height and weight of women generally to show how a hiring policy would impact on women applicants in a specific case. *Id.* The Court held that reliance on general population demographic data was not misplaced where there was no reason to suppose that such data would differ from that of the specific case, ibid, p. 330.

The question presented here is what happens when the general data does not support the specific case. In the instant case, the Court unilaterally concluded that:

(1) it could assume as a matter of law that the years of teaching experience of *teachers* on the job was the same as the years of teaching experience of *applicants*;

(2) it could hold as a matter of law that the statewide statistics were controlling over the actual hiring record even though the actual hiring record showed that the applicants in the protected age group applied and were hired at the same rate before and after the alleged hiring policy was adopted.

Petitioner submits that Certiorari should be granted in order to clarify the basis on which disparate impact can be found in any discrimination case under the Civil Rights Act or the Age Discrimination in Employment Act.

c. What degree of disparity is necessary to render impact illegal?

Supreme Court cases have permitted a plaintiff to recover in a discrimination case if the disparate impact was substantially greater on a protected group than on others. *Dothard v. Rawlinson,* 434 U.S. 321 (1977). Impact alone is not sufficient. For example, a policy excluding right handed people would exclude 90% of all the people in a protected group, but the same policy would also exclude 90% of everyone else. Such a policy would not violate the Civil Rights Act or the Age Discrimination Act. To constitute illegal discrimination, the impact must be greater on the protected group than on people generally.

In the instant case, Plaintiff offered general data suggesting that the alleged policy, if applied, would exclude 92.6% of the protected group and only 60% of the others. This Court has upheld recovery where the protected group is affected 40 times more than the others. *Id.* In the instant case, the protected group is affected 1.5 times more than the others.

Defendants submit that Certiorari should be granted in order to clarify the degree to which a neutral policy would have to have a disparate impact in order to constitute a violation of the Age Discrimination Act.

d. Is salary cost a legitimate consideration for a public employer in selecting among applicants?

The law prohibits age discrimination but specifically allows employers to take action if the circumstances show a "differentiation based on reasonable factors other than age." 29 U.S.C. Sec. 623(f)(1). In public school systems throughout the country, teachers are paid in accordance with years of experience and the degrees held. For example, in the instant case, the salary step schedule for teachers in 1976-77 ranged from

about $10,000 to over $20,000. Consequently, consideration of the experience of an applicant can have a substantial impact on the budget of a school system. The Circuit Court in the instant case concluded that consideration of the experience of applicants automatically violated the Age Discrimination Law.

Petitioner submits that Certiorari should be granted in order to determine whether employers are prohibited from considering the *initial* salary cost of each applicant in the selection process.

B. THERE IS A CONFLICT AMONG CIRCUIT COURTS OF APPEAL ON THE NECESSARY STANDARD OF CAUSATION IN ADEA CASES.

I. Is the standard of causation to be applied in cases alleging discrimination: (a) the "one reason" standard; (b) the "one reason that made a difference" standard; or (c) the "determinative factor - but for" standard?

There is a conflict among the Circuit Courts as to the proper standard of causation in discrimination cases. In the 6th Circuit, the Court adopted the test of whether age was a factor that made a difference. *Laugesen v. Anaconda Company,* 510 F.2d 307 (6th Cir., 1975). In the First Circuit, the Court specifically rejected that test and adopted the "but for" test of whether age was a determinative factor. *Loeb v. Textron, Inc.,* 600 F.2d 1003 (1st Cir., 1979). By a 2-1 vote, the Second Circuit in the instant case approved a two-part standard as follows: (a) in oral instructions to the jury, whether the hiring guideline was one reason that made a difference (b) in written interrogatory to the jury, whether the hiring guideline was one reason for the rejection of the Respondent.

The distinction between the different tests is real and significant. For example, under the "one reason" test, several applicants for a single position could claim that age was one reason for their rejection. The result would be that several persons could each recover back pay for the single vacancy that existed. This would not be true under the "but for" test for then the comparative merits of the applicants would have to be considered, and only one person could recover for each vacancy.

Petitioner submits that Certiorari should be granted to resolve the conflict between the Second and First Circuit courts and to consider appropriateness of the standard of causation to be applied in age discrimination cases.

SUMMARY

Because there are important questions of law not yet settled as to the ADEA, and because there is a conflict among Circuit Courts of Appeal on the question of the applicable standard of causation in age discrimination cases, (a question bound to recur in many other cases), Petitioners believe the instant case is an appropriate one for this Court to review and therefore ask that this Petition be granted and the Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

RUSSELL LEE POST, JR.

O. BRADFORD GRIFFIN, JR.

Attorneys for Petitioner

January, 1981

No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

WALTER MARKHAM, ET AL
Petitioners

v.

MIRIAM E. GELLER,
Respondent

APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MIRIAM E. GELLER, on behalf of herself and all others similarly situated :

v. : CIVIL NO. H-77-363

WALTER MARKHAM, ET AL. :

RULING ON DEFENDANTS' MOTION FOR NEW TRIAL

This is a case brought by Miriam Geller under the class-action provisions of the ADEA.[1] After a full trial, a unanimous jury found that Mrs. Geller was entitled to $15,190 in back pay from the defendant school for its refusal to hire her on the basis of her age. Defendants have previously moved unsuccessfully for a directed verdict and a judgment notwithstanding the verdict. They now seek a new trial on the grounds of inadequate jury instructions. In particular they complain that this Court should not have ruled that their use of an "experience" factor, *i.e.*, the "sixth-step guideline," was a per se violation of the ADEA, and that the jury should not have been given the "one-of-the-reasons" standard for determining the causation nexus.

Where the interests of justice require, the District Court is empowered to grant a new trial, Fed. R. Civ. P. 59; *Moore's Federal Practice* ¶59.08[1] (2d ed.) at 59-102, and a prejudicial error in the instructions given to the jury is properly grounds for granting a Rule 59 motion. *Moore's Federal Practice* ¶59.08[2] (2d ed.) at 59-105; *Ambrose v. Wheatley*, 321 F. Supp. 1220 (D. Del. 1971). Consequently, a careful analysis of the defendants'

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[1] 29 U.S.C. §621 *et seq.*

objections is necessary in spite of the fact that they have already been considered and rejected in earlier rulings.

ADEA Violation as a Matter of Law

This case centered on the defendants' use of the so-called "sixth step" policy which reads as follows:

> "Except in special circumstances and to the extent possible, teachers needed in West Hartford next year will be recruited at levels below the sixth step on the salary schedule."

Uncontraverted evidence established that the application of this policy to the general pool of job applicants had a disproportionate impact on those applicants between the ADEA protected ages of 40-65. (In fact, 92.6% of all the applicants who were disadvantaged by the West Hartford School District's use of this policy were over 40 and under 65.) Consequently, this Court instructed the jury as follows:

> "[This Court has decided] as a matter of law that this ['sixth-step'] guideline has an adverse impact on job applicants over 40 years of age as compared with applicants under that age.... So I say that if implemented that would be a violation of the Age Discrimination Act. Now the issue for you to decide with regard to Mrs. Geller, therefore, is what role this guideline played in the defendants' decision not to offer Mrs. Geller a permanent teaching position at the Bugbee Elementary School."

Defendants argue that this was error since the jury should have been instructed that the plaintiff had to prove that the facially neutral restriction was enacted with an intent to discriminate against the aged before the jury could find its use to be a violation of the ADEA. Defendants' argument, however, is based on at

least two lines of authority, neither of which are applicable to the facts of this case. A closer analysis substantiates this court's view that the instruction given was not in error.

The first distinction that needs to be drawn is between those employment discrimination cases involving disparate treatment and those involving disparate impact.[2] The standards connected with the former arise out of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) while the latter stem from the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Both standards are applicable to Title VII cases and are valuable guides to ADEA suits as well. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979); *Hodgson v. First Federal Savings & Loan Ass'n.*, 455 F.2d 818, 820 (5th Cir. 1972); *Quinn v. Bowmar Publishing Co.*, 445 F. Supp. 780, 784 (D. Md. 1978); *Schulz v. Hickok Manufacturing Co., Inc.*, 358 F. Supp. 1208, 1212 n. 2 (N.D. Ga. 1973); *cf. Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *Reich v. Dow Badische Co.*, 575 F.2d 363, 367 (2d Cir. 1978), *cert. denied*, 99 S.Ct. 621; *Nabors v. United States*, 568 F.2d 657, 659 at n. 3 (9th Cir. 1978).

In *McDonnell Douglas*, an individual black plaintiff filed a complaint alleging that McDonnell Douglas had discriminated against him when it refused to rehire him following a general layoff. McDonnell Douglas responded claiming that its refusal to hire the plaintiff was predicated on his involvement in an illegal plan to block traffic in a protest over McDonnell Douglas policies. The issue before the Court was the proper order and burden of proof in such cases. After noting the disagreement between the circuits, it held that once the plaintiff made

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[2]*See generally*, B. Schlei and P. Grossman, Employment Discrimination Law, (1976 and Supp. 1979).

out a prima facie case of discrimination[3] the employer had to come forward and "articulate" a legitimate non-race related justification for its action. After it had done so, the plaintiff was to be offered an opportunity to prove that the employer's justification was a mere "pretext" for racial discrimination.

Although the Court did not say so in so many words, the last determination essentially involves a question of motive. If, in an individual case, the plaintiff cannot demonstrate an improper motive there is no way for the jury to find that he was discriminated against. In other words, the employee fails to establish his claim because he has not proved that a racially biased reason actually accounted for the company's failure to hire him.

While the *McDonnell Douglas* standards have been extended to age discrimination suits, *e.g., Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979); *Wilson v. Sealtest Foods Div. of Kraftco Corp.*, 501 F.2d 84, 86 (5th Cir. 1974), they are "surely not the only...way of establishing a legally sufficient prima facie case...." *Loeb v. Textron, supra* at 1017 (footnote omitted). In the analogous area of Title VII, the Supreme Court has been careful to insure that *McDonnell Douglas* standards are not treated as the exclusive method of establishing Title VII violations.

> "The company and union seize upon the *McDonnell Douglas* pattern as the *only* means of establishing a prima facie case of individual discrimination. Our decision in that case, how-

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[3]Although the Court referred to this initial showing as establishing a "prima facie" case, it, standing alone, is insufficient to get the case to a jury. In Board of Trustees of Keene State College v. Sweeney, 47 U.S.L.W. 3330, No. 77-1792 (Nov. 13, 1978), the Court made it clear that the plaintiff had the burden of persuasion throughout and that the burden on the defendant is only to articulate some justifiable reason for his action. Unless the plaintiff presents evidence tending to show that the employer's reason is a "pretext" for discrimination, the defendant will be entitled to a directed verdict.

ever, did not purport to create an inflexible formulation. We expressly noted that '[t]he facts necessarily will vary in Title VII cases, and the specification...of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.' *Id.*, at 802 n.13. The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977) (footnote omitted) (emphasis in original). In particular, as an alternative to the *McDonnell Douglas* approach, a long line of authority has allowed plaintiffs to establish a prima facie case of discrimination by demonstrating the disparate impact on a minority group of a general policy, procedure or test utilized in hiring, promotions or discharges. Beginning with *McDonnell Douglas* itself, the Court has always distinguished class action challenges to general company policies from challenges to the individual discriminatory act of the type alleged in *McDonnell Douglas*. 411 U.S. at 802 n.14. The disparate impact test has been utilized in numerous subsequent cases, each involving a challenge to a general policy or procedure. *E.g., Teamsters, supra; Dothard v. Rawlinson*, 433 U.S. 321 (1976); *cf. Loeb v. Textron, Inc.*, 600 F.2d 1003, 1017 (1st Cir. 1979) ("Supreme Court has held that a prima facie showing of discrimination can be made in a class action by showing discriminatory hiring patterns and practices.")

"The *Franks* case thus illustrates another means by which a Title VII plaintiff's initial burden of proof can be met. The class there

> alleged a broad-based policy of employment discrimination; upon proof of that allegation there were reasonable grounds to infer that individual hiring decisions were made in pursuit of the discriminatory policy and to require the employer to come forth with evidence dispelling that inference."

Teamsters, supra at 359 (footnote omitted).

In disparate impact, as opposed to disparate treatment, Title VII cases, proof of motive is not required. "Under the Act, practices, procedures or tests neutral on their face, and even neutral in forms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971); *General Electric Co. v. Gilbert*, 429 U.S. 125, 137 (1976). *See also, Washington v. Davis*, 426 U.S. 229, 246-48 (1976). The reason for the distinction is obvious. In individualized cases, absent proof of a wrong motive, there is no basis for determining whether the race, or in this case age, of the aggrieved employee affected the employer's decision. Thus there can be no showing of discrimination. In broader challenges to company policies, however, discrimination can be shown from statistics alone. Thus under *McDonnell Douglas* the burden of proof remains on the plaintiff throughout because no prima facie case of discrimination is made out until after the plaintiff establishes motive. In the *Griggs* line of authority, a showing of disparate impact shifts the burden to the defendants to establish the "job-relatedness" of their tests or the "business necessity" behind their policies. This is consistent with the explanation that the plaintiff has made out his prima facie case under *Griggs* as soon as disparate impact is shown.

In this case, plaintiff clearly advances a broad attack on a general policy of the school board. She does not challenge the motive of those who made the individualized decision to hire her. Rather she has claimed

that she, and all others similarly situated, have been discriminated against by the application of the general school board policy. Thus, Mrs. Geller falls squarely within the *Griggs* line of authority, and the *McDonnell Douglas* notions of motive are inapplicable.

Defendants, as a second independent basis for their "motive" requirement, rely on the cases of *Washington v. Davis,* 426 U.S. 229 (1976) and *Personnel Administrator of Massachusetts v. Feeney,* 47 U.S.L.W. 4650, No. 78-233 (June 5, 1979). Neither of these cases support defendants' position here, however, since they were both expressly decided on constitutional grounds. In *Washington v. Davis,* when the Court announced that disparate impact alone is insufficient to establish a prima facie case of a violation of the Equal Protection Clause, it carefully distinguished this rule from the rule which is applicable in statutory Title VII claims. 426 U.S. at 246-48. There is no reason to suppose that Congress would want the ADEA and Title VII treated differently in this respect. In fact, if anything, the evidence is to the contrary. *Lorillard v. Pons,* 434 U.S. 575, 584 (1978) ("In fact, the [substantive] prohibitions of the ADEA were derived *in haec verba* from Title VII"). Therefore, in spite of the fact that motive is a relevant factor in equal protection claims and in Title VII disparate treatment claims, it is inapplicable to Title VII disparate impact claims such as the one advanced by Mrs. Geller in this suit. Because the plaintiff did not need to demonstrate an intent to discriminate, the court was correct in charging the jury that the application of the sixth-step policy constituted a violation of the ADEA.[4] Consequently, defendants' motion for a new trial on this ground is denied.

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[4]Title VII actions are generally considered equitable in nature and are, therefore, tried to a judge. Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); Travers v. Corning Glass Works, 76 F.R.D. 431, 434 (S.D.N.Y. 1977) (Weinfield, J.). Consequently, case law developed under Title VII is of no assistance in determining whether or not a finding of disparate impact amounts to a finding of discrimination as a matter of law or whether it is an issue for the trier of fact. It

Standard of Causation

Defendants also advance a second ground in support of their motion for a new trial. They complain of the standard of causation enunciated by the court.[5] In submitting the case to the jury, the court propounded several questions which the jury was to answer. As to each of the defendants the jury was asked if the sixth-step guideline was "one reason for [the defendant's] decision not to recommend Mrs. Geller for the permanent art teacher's position at the Bugbee School." On each question, the jury found by unanimous vote that the defendants had, indeed, considered such a guideline as at least "one reason" for their refusal to hire the plaintiff.

Defendants now argue, as they did before, that an instruction which allows the jury to premise liability on a finding that age was "a reason" rather than a "determinative factor" is contrary to the law, and they seek to buttress their motion by the First Circuit's decision in *Loeb v. Textron, Inc.*, 600 F.2d 1003. In that case, the court held that an instruction to the jury that plaintiff's age had to have "made a difference in determining if he was demoted, or retained or discharged" was inadequate. Instead, the First Circuit ruled that a "but-for" demonstration by the aggrieved employee would be required. Only if age was a "but-for" cause of the discharge, *i.e.*, a "determining" factor, should damages be awarded to the plaintiff.

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4 (continued)
need not be decided here, however, where there is no real disagreement over the extent of the impact on those between the ages of 40 and 65 and where the magnitude of the impact is so substantial. For even if it is a question of fact, where no reasonable jury applying the proper law could possible disagree, the court is justified in removing a factual question from the jury and deciding it as a matter of law. Baker v. Texas and Pacific Railway Co., 359 U.S. 227, 228 (1959); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 885 (2d Cir. 1972). Such is the case here.

[5]No clear consensus on the exact wording of the causation standard has yet emerged. As with all new statutes, the courts have been exploring alternative formulations which express the essence of the

Frankly, however, this Court fails to understand the fine lines which the First Circuit is drawing in this area. An illustration can help illuminate this Court's belief that the two instructions distinguished in *Loeb* amount to different words for describing the same essence.

Suppose that a hypothetical plaintiff, in addition to being over 50 years old, had only had two years of college education and had a criminal record for child molestation. The defendant employers are called to the stand and they attest to the following facts: first, they admit that they have a firm policy against hiring anyone over 50, and secondly, they point out that even if the plaintiff were under 50 they would never hire a child molester. In this hypothetical, age was clearly a factor which was considered, but it cannot be said to be a factor which "made a difference." The same sentiment can be expressed in other words. Age was not the "but-for" cause of the defendants' refusal to hire the plaintiff and therefore was not a "determinative factor."

Now, altering the hypothetical slightly, suppose that the plaintiff is over 50 years old with only two years of college education and no criminal record. Our same hypothetical defendants take the witness stand and testify as follows: "Had the plaintiff been under 50 with two years of college education she would have been

5 (continued)
statute in words clearly understandable to the layperson. Consider: Reed v. Shell Oil Co., 14 FEP 875, 877 (S.D. Ohio 1977) (whether "age constituted any factor in the discharge"); Usery v. General Electric Co., 13 FEP 1641, 1646 (M.D. Tenn. 1976) (plaintiff must show "age was one factor which in fact made a difference in determining whether [plaintiff] would be discharged or retained"); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 17 FEP 448, 449 (8th Cir. 1978) (must "show that age was a determining factor"); Magruder v. Selling Areas Marketing, 439 F. Supp. 1155, 15 FEP 1506, 1514 (N.D. Ill. 1977) (same); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 14 FEP 952, 970-71 (E.D. Mich. 1976) (age must be a "determining" factor rather than "a" factor); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) (age must be a "determining" factor); Coates v. National Cash Register, 433 F. Supp. 655, 660 (W.D. Va. 1977) ("one of the reasons for their discharge was their age").

hired. If she were over 50 with four years of college education she also would have been hired." The jury again retires to deliberate and this time, quite correctly, concludes that not only was age a factor that was considered, but that the plaintiff's age, "made a difference." Again the same conclusion would be expressed by pointing to age as a "but-for" or "determining" factor. This Court is unable to perceive the separate strand which the First Circuit seeks to treat differently. As to any situation where age is a factor which "makes a difference" it would also seem to be a "but-for" factor as well. Consequently, this Court fails to see any difference between the rule announced in *Loeb* and the older, more traditional test of a factor "which made a difference," *Laugesen v. Anaconda Company,* 510 F.2d 307 (6th Cir. 1975), relied on in this case.

This inability to see distinctions does not extend so far, however, that the court is unable to see the difference between "a factor" and "a factor which makes a difference." In the first hypothetical discussed above, age was clearly a factor considered in spite of the fact that it was not a factor which made a difference. If relief were to be afforded every time age was considered, the effects would go well beyond the remedial designs of the drafters of the ADEA. Back pay would be awarded to those who never had a chance for the job at any age. While doing so would provide a strong deterrent against age discrimination, it would be a deterrent far in excess of the limited deterrent Congress intended to provide when it enacted the ADEA. *Cf. Dean v. American Sec. Ins. Co.,* 559 F.2d 1036 (5th Cir. 1977), *cert. denied,* 434 U.S. 1066 (1978).

Thus the court is left with the question of whether its instructions to the members of the jury merely required that they find age to be "a factor" or whether the jury was also obligated to find that it was "a factor which made a difference." On close analysis, I find that the instructions actually given closely resembled the latter standard. While perhaps inartfully drafted, they certainly conveyed the necessary standard to the jury

since in order for the jury to have found age to have been a "reason" for the defendants" decision it must also have found it to be a "factor which made a difference." At least one other court has characterized the "one of the reasons" language as expressing the same standard as the "factor making a difference" language. *Coates v. National Cash Register,* 433 F. Supp. 655, 660, 661 (W.D. Va. 1977). This is particularly true in this case where the special interrogatories were sent to the jury in the context of an oral instruction which included, in part, the following language:

> "There could have been more than one reason for defendants' decision about [Mrs. Geller's] employment but she is nevertheless entitled to recover if one factor was her [age] *and if it made a difference in determining whether she would be employed.* If it did not make any difference, if it was not a reason that entered into the decision, then of course she has not proved her case. But if it did, then she has.
>
> "If defendants' decision about Mrs. Geller was made in whole or in part because she was above the fifth step on the salary scale,...Mrs. Geller is entitled to recover...." (emphasis added.)

When the jury instruction and interrogatories are viewed in their totality, it is clear that no error of law has been made. Defendants' motion for a new trial is denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 18th day of December, 1979.

/s/ M. Joseph Blumenfeld

M. Joseph Blumenfeld
United States District Judge

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 41, 87—September Term, 1980

(Argued September 5, 1980 Decided December 8, 1980)

Docket Nos. 80-7087, 80-7089

MIRIAM E. GELLER,

Plaintiff-Appellant,
Cross-Appellee,

—against—

WALTER MARKHAM, *et al.*,

Defendants-Appellants,
Cross-Appellees.

Before:

LUMBARD, MANSFIELD and MULLIGAN,
Circuit Judges.

Appeal by plaintiff from an order of the District Court for the District of Connecticut, entered by Judge M. Joseph Blumenfeld after a jury verdict awarding damages against defendant employers on the ground that they

violated her rights under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* Plaintiff appeals from the court's denial of equitable relief, including reinstatement, retroactive seniority and pension benefits. Defendants cross-appeal from the judgment entered upon the jury's verdict.

Affirmed in part and reversed in part.

ELIZABETH K. SPAHN, Esq., Boston, MA (Gary J. Mena, Esq., Newton Center, MA, of counsel), *for Plaintiff-Appellant.*

RUSSELL LEE POST, JR., Esq., Avon, CT (O. Bradford Griffin, Jr., Avon, CT, of counsel), *for Defendants-Appellees.*

MANSFIELD, *Circuit Judge:*

Miriam Geller, a 55-year old teacher, brought a class action in the District Court for the District of Connecticut under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621, *et seq.*, claiming that defendants-appellants violated her rights by denying her employment as a teacher because of her age. She sought damages, equitable relief (including reinstatement, pension rights, benefits and seniority) and attorney's fees. A jury trial before Judge M. Joseph Blumenfeld resulted in an award of $15,190 damages. Following the trial, Judge Blumenfeld denied her application for equitable relief but awarded attorney's fees. From this denial she appeals. Defendants cross-appeal from the judgment against them,

asserting that the court erred in its conclusions as to governing legal principles and in its instructions to the jury regarding causation.

We affirm the finding of defendants' liability, since the record reveals that defendants subjected Ms. Geller to a hiring practice with both discriminatory impact, see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and illegally disparate treatment, see *McDonnell Douglas Co. v. Green*, 411 U.S. 792 (1973), the principles of which may be applied in ADEA cases. See *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). We also affirm the district court's refusal to award reinstatement, but reverse its decision not to award pension benefits.

Ms. Geller applied for a position as a teacher at Bugbee School in West Hartford in late August, 1976. She was then 55 years old. She had gained considerable experience as a tenured teacher in New Jersey, where she had lived until shortly before applying for the Bugbee job, and she had done some work as a substitute teacher in the Connecticut schools. She was interviewed for a permanent position to fill a "sudden opening" in the Bugbee School on September 3, 1976, and was told to be ready to begin teaching art on September 7. Meanwhile, school officials continued to interview other candidates for the job.

Ms. Geller prepared the art room over Labor Day weekend, and taught school until September 17, when she was replaced by a 25-year old woman who had not applied for the job until September 10. Shortly thereafter, Ms. Geller brought the present suit, alleging violations of ADEA, and pointing in particular to the "Sixth Step Policy" adopted by the West Hartford Board of Education ("Board"). This cost-cutting policy, which was derived from a statement included by the previous Bugbee

School Superintendent in his budget report to the Board, read:

> "Except in special situations and to the extent possible, teachers needed in West Hartford next year will be recruited at levels below the sixth step of the salary schedule."

The sixth step is the salary grade reached by teachers with more than five years' experience.

At trial plaintiff introduced expert statistical testimony establishing that 92.6% of Connecticut teachers between 40 and 65 years old (the protected age group under ADEA) have more than 5 years experience, while only 62% of teachers under 40 have taught more than five years. She also presented considerable evidence in the form of witnesses' testimony that individual defendants had discussed the "sixth step" policy with her, and had taken the policy into account when deciding to replace her. Defendants countered that the ratio of hirees over 40 years of age to under-40 hirees had not changed substantially since the announcement of the "sixth step" policy. From these latter statistics, which were offered not by an expert statistician but by Mr. Hedrick, a named defendant, defendants argued that the "sixth step" policy had never been applied to discriminate on the basis of age. They claimed that Ms. Geller had been replaced by a younger woman because hiring officials considered the younger woman more qualified, not because the school board was unwilling to pay a woman with her experience. Defendants also argued that even if the "sixth step" was applied, they were justified in applying it because an "experience-cost criterion" for hiring was necessary in view of declining enrollments and rising school costs.

Largely on the strength of plaintiff's expert statistical evidence, Judge Blumenfeld found that defendants' "sixth step" policy was discriminatory as a matter of law. He found the case to be governed by the line of cases regulating facially neutral employment policies which have a discriminatory impact, see *Griggs v. Duke Power Co., supra; Dothard v. Rawlinson,* 433 U.S. 321 (1977); *Washington v. Davis,* 426 U.S. 229, 247 (1976). He declined to accept defendants' contention that proof of a violation of ADEA required establishment of discriminatory motive. With respect to plaintiff's claim of disparate treatment, see *McDonnell Douglas Co. v. Green, supra,* however, he took the view that to sustain this claim plaintiff must ultimately prove a discriminatory motive on the defendants' part and that proof that they discharged her because of the application of the "sixth step" policy was insufficient, rendering *McDonnell Douglas* "inapplicable."

After instructing the jury that the "sixth step" policy was discriminatory on the basis of age as a matter of law, Judge Blumenfeld submitted to it the question of whether this policy had been applied to Ms. Geller. First, in his oral instructions to the jury, he asked it to determine "if the decision about Mrs. Geller was made in whole or in part, because she was above the fifth step," and if the "sixth step" policy "made a difference" in the decision to replace her with the younger woman, stating:

> "There could have been more than one reason for defendants' decision about [Mrs. Geller's] employment but she is nevertheless entitled to recover if one factor was her [age] and if it made a difference in determining whether she would be employed. If it did not make any difference, if it was not a reason

that entered into the decision, then of course she has not proved her case. But if it did, then she has.

"If defendants' decision about Mrs. Geller was made in whole or in part because she was above the fifth step on the salary scale, . . . Mrs. Geller is entitled to recover. . . ."

He then submitted special interrogatories to the jury, as follows:

"THE COURT: I propose to submit some Special Interrogatories.

1. Was the sixth step guideline one reason for Mrs. Geller not being hired for the permanent art teacher's position at the Bugbee Elementary School? Answer: Yes or No.

MR. POST: Sir, could I ask that that interrogatory track with your charge to the Jury and say, 'One reason that made a difference.'?

THE COURT: No. If it was one reason, that is sufficient.

MR. POST: That made a difference in their decision.

THE COURT: No. If it was one reason."

The jury found for Ms. Geller, answering the first Special Interrogatory in the affirmative. It then responded to Judge Blumenfeld's charge to award "damages equal to the amount of losses plaintiff suffered due to defendants' discriminatory actions, less amounts earned through reasonable efforts at mitigation," by awarding $15,190 in back pay, which equalled the salary Ms. Geller would have earned at the Bugbee School in

1976. In answer to another interrogatory, the jury did not find that the defendants' discrimination was "willful."

In post-trial motions plaintiffs applied for equitable relief based upon the jury's verdict, specifically requesting reinstatement, pension benefits, and attorney's fees. All of these requests except for the request for attorney's fees were denied. Plaintiff has assigned as error the denial of these requests for relief, while defendants attack Judge Blumenfeld's instructions to the jury and his ruling that the "sixth step" policy was discriminatory as a matter of law.

DISCUSSION

As the Supreme Court pointed out in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977), discriminatory or disparate treatment in violation of Title VII occurs where "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." "Disparate impact," on the other hand, results from the use of "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.*, 431 U.S. at 336 n.15. Proof of motive is not required to sustain a claim of disparate impact.

Defendants argue that principles with respect to discriminatory racist impact in violation of Title VII should not govern age discrimination cases instituted under 29 U.S.C. § 626(c)(1). We disagree. In *Lorillard v. Pons*, 434

U.S. 575, 584 (1978), the Court noted that "the [substantive] prohibitions of the ADEA were derived *in huec verba* from Title VII." Although the ADEA did not adopt Title VII's procedural rules entirely, the rule permitting a case to be established by a showing of discriminatory impact or treatment cannot reasonably be viewed as merely procedural. See *Oscar Mayer Co. v. Evans*, 441 U.S. 750, 755-56 (1979).

Disparate Impact

A prima facie case of discriminatory impact may be established by showing that an employer's facially neutral practice has a disparate impact upon members of plaintiff's class, in this case teachers over 40 years of age. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1970). Such a discriminatory impact is frequently evidenced by statistics from which it may be inferred that an employer's selection methods or employment criteria result in employment of a larger share of one group (here, teachers under 40 years of age) than of another (teachers over 40). *Intl. Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 339 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977). The employer may defend by showing that the employment practice is justified by business necessity or need and is related to successful performance of the job for which the practice is used, *Griggs v. Duke Power Co., supra*, 401 U.S. at 424, 432. In that event the plaintiff must be given an opportunity to show that other selection methods having less discriminatory effects would serve the employer's legitimate interest in competent performance of the job. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

A prima facie case of discriminatory treatment may be made out by the plaintiff's showing:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 582 (1978). The burden then shifts to the employer to go forward with evidence of "some legitimate, nondiscriminatory reason for the employee's rejection," *McDonnell Douglas Corp., supra,* 411 U.S. at 801, in which event the plaintiff, who has the ultimate burden, must be afforded the opportunity to demonstrate by competent evidence that the employer's presumptively valid reasons are a cover-up or pretext. *Id.* at 805. If the plaintiff succeeds in this showing the employer's articulated reason will not stand. *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978).

Turning to the present case, the plaintiff showed through an accredited expert (Dr. Alan Hunt), based on his statistical analysis of the relationship between age and years of experience for teachers in Connecticut, that 92.6% of all teachers over 40 years of age have five or more years of teaching experience, which he characterized as "very significant" statistically or about "600 times the level generally required for statistical significance." Although the significance of the 92.6% figure is somewhat weakened by evidence that over 60% of teachers under 40 also have had more than five years experience, we agree

with Judge Blumenfeld's finding that the high correlation between experience and membership in the protected age group (40 to 65 years of age) would render application of the "sixth step" policy discriminatory as a matter of law, see *Coates v. National Cash Register Co.*, 433 F. Supp. 655, 661 (W.D. Va. 1977), since, absent countervailing statistics, the likelihood of a person over 40 being selected under the policy would be substantially less than that of a person under 40. The purpose of the "sixth step" policy was to economize by employing less experienced teachers, which would inevitably open more teaching opportunities to younger less experienced applicants than to the older, who were more experienced.

Defendants have offered two lines of defense, both of which are unpersuasive. First they contend that, although the "sixth step" policy appears to be correlated strongly to membership in the group over 40, the policy did not in fact result in discrimination against this group since the percentage of over-40 teachers hired to fill job openings before and after the application of the policy was about the same. The uncorroborated statistics offered in support of this contention, however, were so defective as to justify the district court's refusal to give them any weight. They were prepared by a named defendant in the case, a former Personnel Director for the West Hartford schools who had no expertise as a statistician and had a direct interest in the outcome of the case.[1] He not only failed to

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[1] In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 433 n.32 (1974), the Supreme Court recognized the problematic validity of statistics produced by such a source:

> "It cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care."

produce any competent evidence of the applicant pool for the periods, which is essential to a statistical determination of hiring patterns, but he employed such dubious analytical techniques as obtaining an overall percentage figure by averaging annual percentages for several different years, thus contravening the basic, well-recognized principle that such averaging by percentages produces meaningless and misleading results. Moreover it appears that there were dramatic changes in the size of the applicant pool and in the number of teachers hired in the West Hartford School District during the mid-1970's, which cast serious doubt upon the statistical significance of the defendants' evidence of allegedly unchanging hiring patterns. In 1968 and 1969, according to defendants' own figures, West Hartford hired 129 and 136 teachers, of whom 28 and 33, respectively, were above the fifth step, and 17 (13%) and 15 (8%), respectively, were over 40. In 1975 and 1976, by contrast, the District hired only 35 and 53 teachers, a substantially smaller group, of whom 7 and 10 were above the fifth step and 2 (6%) and 4 (8%), respectively, were over 40.[2]

Cases involving statistics can pose a formidable challenge to a court. As the Supreme Court has observed, " 'Statistics . . . come in infinite variety. . . . [T]heir usefulness depends on all the surrounding facts and circumstances'. . . . Only the trial court is in a position to make the appropriate determination." *Hazelwood v. United States,* 433 U.S. 299, 312 (1977), quoting *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 340 (1977). A trial court is best able to evaluate the credibility and professionality of the witnesses who

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2 Ms. Geller has conceded that the "sixth step" policy was never applied as an absolute exclusionary barrier to applicants over 40.

provide statistical evidence, to consider all the statistical evidence advanced, to draw inferences from different parties' failure to include relevant statistics that are available to them, and to assess the validity of assertedly objective numerical evidence by considering the influence of unaccounted-for factors upon the numbers presented. Where, as here, the statistical evidence, or its absence, leads to an indisputable result, the judge is justified in taking the evaluation of the statistics away from the jury.

Here Judge Blumenfeld rightly found that the "sixth step" policy was discriminatory on its face. From there, he apparently declined to rely on statistics either to establish as a matter of law plaintiff's position that the policy was applied or to support defendants' position that it was not applied. Absent statistics regarding any changes in the applicant pool for teaching jobs as overall hiring decreased, comparative evidence of overall hiring percentages carries little weight, since these percentages may have remained constant despite an increase or fall-off in over-40 applicants. In the face of these deficiencies in the statistical proof and the existence of testimony that the "sixth step" policy was applied in Ms. Geller's individual case, which was disputed, Judge Blumenfeld properly submitted the issue of whether it was applied to the jury, which resolved the question in her favor by finding that the "sixth step" policy was one reason for the hiring of a younger replacement.

Defendants' second line of defense, somewhat inconsistent with their contention that the "sixth step" policy was never followed, is that the policy, if applied, was supportable as a necessary cost-cutting gesture in the face of tight budgetary constraints. This cost justification must fail, however, because of the clear rule that

> "a general assertion that the average cost of employing older workers as a group is higher than the

> average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed." 29 C.F.R. § 860.103(h) (1979).

Accord, *Marshall v. Arlene Knitwear, Inc.*, 454 F. Supp. 715, 728 (E.D.N.Y. 1978) ("Where economic savings and expectation of longer future service are directly related to an employee's age, it is a violation of the ADEA to discharge the employee for those reasons" (citations omitted)); *Laugeson v. Anaconda Co.*, 510 F.2d 307, 316 (6th Cir. 1975) ("Since it was obvious that economic conditions had to play an important part in the decision, it was vital for the jury to know that this alone would not dispose of the case if Laugeson's age induced Anaconda to discharge him instead of someone else"). Accordingly, we conclude, that Ms. Geller established disparate impact by proving that she was subjected to a facially neutral policy disproportionately disadvantaging her as a member of a protected class. *Griggs v. Duke Power Co., supra; Dothard v. Rawlinson, supra.*

Disparate Treatment

The record also reveals that, in addition to making out a case of disparate impact, Ms. Geller established a prima

facie case of discriminatory treatment under *McDonnell Douglas, supra,* satisfying the oft-repeated four conditions prescribed by the Court in that case. At age 55 she was clearly within the protected group under ADEA. She applied for the teaching job, was concededly qualified for it, and was even hired temporarily to perform it. She was then released, and saw a younger person placed in the job for which she was concededly qualified. These undisputed facts are sufficient to place upon the defendants the burden of rebutting her prima facie case.[3] For reasons already stated, the defenses that the "sixth step" policy was not applied to Ms. Geller and that, if applied, it was cost-justified, must be rejected. The only other defense, that the discharge of Ms. Geller in favor of a younger teacher, was not motivated by the policy but by the superior competence of the latter candidate, was rejected by the jury's findings.

Causation

This leads us to defendants' final contention, that the court erred in instructing the jury as to the part age must play in determining whether they violated ADEA in discharging Ms. Geller. In order to make out a case under ADEA Ms. Geller was not required to show that age discrimination was the *sole* cause of her discharge. Where an employer acts out of mixed motives in discharging or refusing to hire an employee, the plaintiff must show that

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[3] Discriminatory treatment analysis is no less applicable to this case because the trial court failed to instruct the jury on the specific elements of a *McDonnell Douglas* prima facie case. See *Furnco Construction Co. v. Waters,* 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014 (1st Cir. 1979).

age was a causative or determinative factor, one that made a difference in deciding whether the plaintiff should be employed. See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979) (plaintiff must prove that age was the " 'determining factor' in his discharge in the sense that 'but for' his employer's motive to discriminate against him because of age, he would not have been discharged"; *Laugeson v. Anaconda Co., supra,* 510 F.2d at 317 ("We believe it was essential for the jury to understand from the instructions that there could be more than one factor in the decision to discharge him and that he was nevertheless entitled to recover if one such factor was his age and if in fact it made a difference in determining whether he was to be retained or discharged. This is so even though the need to reduce the employee force generally was also a strong, and perhaps even more compelling reason"). Accord, *Cova v. Coca Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978).

Both parties here suggest that the *Laugeson* and *Cova* standard is in conflict with the *Loeb* rule. We disagree. If age discrimination was a "factor . . . [which] made a difference," then the employee's fortunes would have been "different" without the discriminatory action and age discrimination was therefore a "but for" cause of the result that did take place.

In the present case Judge Blumenfeld submitted to the jury a special interrogatory which asked whether the "sixth step" guideline was "one reason" for Ms. Geller's not being hired for the permanent art teacher's position. He refused to amend the interrogatory to read "one reason that made a difference." Standing alone, this refusal to amend might entitle defendants to a retrial since the jury, absent further instructions, could have found that the "sixth step" guideline, although consid-

ered by the Board as a factor, may not have been a determinative one. However, the interrogatory followed hard on the heels of an instruction in which the jury was told that it could find liability only if Ms. Geller's age "made a difference in determining whether she would be employed" and that "[i]f it did not make any difference—then of course she has not proved her case. But if it did, then she has." We conclude that, while it would have been advisable to repeat the gist of the latter language in the interrogatory, the instructions and the interrogatory, read together, were adequate. In this context the words "a reason," as used in the interrogatory, meant a reason which made a difference and hence were sufficient. Our view is fortified by undisputed evidence, including testimony of Dr. Johnson and Messrs. Metzger and Hedrick, as well as tape recordings of conversations between Ms. Geller and the various defendants, that the "key factor" was the "sixth step" policy. The principal of the school, Dr. Johnson, testified that she "rendered an excellent service. I have nothing but praise for her."

Equitable Relief

We next turn to Ms. Geller's contention that the district court erred in denying her equitable relief beyond the damages awarded by the jury. Title 29 U.S.C. § 626(c)(1) provides, "Any person aggrieved [by an alleged violation of the ADEA] may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." Section 626(b) defines the available legal and equitable relief as "including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability of amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." The Supreme Court, defining which forms of relief were

legal and which equitable so that it could determine which should be submitted to a jury, has noted that § 626

> "does not specify which of the listed categories of relief are legal and which are equitable. However, since it is clear that judgments compelling 'employment, reinstatement of promotion' are equitable, see 5 J. Moore, Federal Practice Par. 38.21 (1977), Congress must have meant the phrase 'legal relief' to refer to judgments 'enforcing . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation.' " *Lorillard v. Pons, supra,* 434 U.S. at 583 n.11.

Judge Blumenfeld viewed reinstatement as inappropriate because he interpreted the jury's decision granting damages equal to one year's salary at Bugbee School as a factual conclusion that Ms. Geller was deprived of only one year's employment by the defendants' discriminatory action. We agree with this conclusion. Ms. Geller had never formally been hired as a permanent teacher during the time she was working but had merely been told to get started. Permanent reinstatement therefore is unwarranted.

On the other hand, we disagree with the trial judge's refusal to consider Ms. Geller's request for lost pension benefits on the ground that "[d]amages for lost pension benefits are one component of the overall damages suffered by a plaintiff, which a jury may assess in ADEA actions." Despite some case law that supports viewing lost pension rights as an aspect of damages, see *Fellows v. Medford Corp.*, 431 F. Supp. 199, 201 (D. Ore. 1977), the better view is that these rights fall within the category of equitable relief, see *Cleverly v. Western Electric Co.*, 450 F. Supp. 507, 510 (W.D. Mo. 1978), *affd.*, 594 F.2d 638, 640 (8th Cir. 1979). As distinguished from damage

awards, which are payable to the plaintiff, pension benefits are paid into pension annuity funds. They merely replace the benefits that would have accrued during the year of employment wrongfully denied to Ms. Geller. Because a judge exercising his equitable power over a discrimination action should afford "make-whole" relief to wronged plaintiffs, *Rodriguez v. Taylor,* 569 F.2d 1231, 1238 (3d Cir. 1977), we remand to the district court with directions to award pension rights to plaintiff for the 1976-77 year, to be paid into the Connecticut Teachers' Pension Fund. Plaintiff's application for reasonable attorney's fees in prosecuting this appeal is granted in the sum of $500 plus her costs in prosecuting the appeal and defending against defendants' cross-appeal.

The judgment appealed from by the defendants is affirmed. The district court's order denying equitable relief to the plaintiff is affirmed except as to the denial of pension benefits which is reversed to the extent indicated.

LUMBARD, *Circuit Judge* (dissenting):

I dissent.

We all agree that the crucial question for the jury's determination was whether age discrimination was a factor which made a difference in determining whether plaintiff was to be retained or discharged. Although the trial judge so told the jury in his oral instructions, he refused to word the written interrogatory submitted to the jury in accordance with his oral instructions. Thus, what the jury took into the juryroom read as follows:

> 1. Was the sixth step guideline one reason for Mrs. Geller not being hired for the permanent art teacher's position at the Bugbee Elementary School?

The trial judge had previously advised counsel of his proposed wording of the interrogatory. Counsel for the defendants specifically objected in the following colloquy:

> Mr. Post: Sir, could I ask that that interrogatory track with your charge to the Jury and say, "One reason that made a difference"?
>
> The Court: No. If it was one reason, that is sufficient.
>
> Mr. Post: That made a difference in their decision.
>
> The Court: No. If it was one reason.

I cannot escape the conclusion that the special interrogatory must have been uppermost in the jury's mind during its deliberation. Even if any juror had remembered the oral instructions, the written interrogatory would surely settle conclusively any question in the mind of any juror. And it was the question in the interrogatory which the jury answered and not anything else.

It follows that the restriction of the written interrogatory was error and that it was an error which could have resulted in a different verdict. It is not so overwhelmingly clear to me as it seems to be to my brothers that the jury would have decided the same way if the trial judge had conformed the wording of the interrogatory to his oral instructions, as he certainly should have done. In this case the jury should have made their decision on a proper instruction; it is not enough for my brothers to do it for them. So that a jury may decide the case on a proper instruction, and on an interrogatory in accordance with the instruction, I would reverse and remand for a new trial.

ALEXANDER STEVAS
CLERK

No. 80-1258.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

WALTER MARKHAM, ET AL.,
PETITIONERS,

v.

MIRIAM E. GELLER,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari.

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WALTER MARKHAM, ET AL.,
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MIRIAM E. GELLER,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari.

Reasons for Denying the Petition for Writ of Certiorari.

I. BOTH THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY APPLIED IN THE LAW GOVERNING CASES OF DISCRIMINATORY DISPARATE IMPACT IN EMPLOYMENT ACCORDING TO THE STANDARDS PREVIOUSLY ESTABLISHED BY THE UNITED STATES SUPREME COURT.

A. *The Supreme Court has Repeatedly Held that Discriminatory Motive Need Not be Established in Disparate Impact Cases Brought Under Congressional Statutes Prohibiting Discrimination in Employment.*

In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15 (1977), the Supreme Court held that proof of discriminatory motive is not required to sustain a claim of disparate impact in an employment discrimination case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-32

(1971). The Court distinguished the standard of proof required in a Title VII disparate impact case from that required in a case brought under the Equal Protection Clause of the Fourteenth Amendment where proof of discriminatory motive is essential. *Washington* v. *Davis*, 426 U.S. 229, 246-48 (1976).

The Supreme Court has previously held in two cases that the substantive provisions of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 626 *et seq.*, were derived *in haec verba* from Title VII. *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755-56 (1979). The Court of Appeals in the instant case correctly held that the standard of proof required under the ADEA is more closely analogous to that required under Title VII than to the proof required for Equal Protection claims. This result is supported by the previous Supreme Court ADEA cases, as well as by the legislative history of the ADEA which repeatedly indicated Congress' intention to enact a 'Title VII for Age'. To manufacture distinctions between closely related Congressional statutes such as the ADEA and Title VII in the absence of Congressional intent supporting the differentiation would have been error on the part of the Court of Appeals.

The Court of Appeals was correctly following the Supreme Court's guidance in *Lorillard* v. *Pons*, *supra*, and *Oscar Mayer & Co.* v. *Evans*, *supra*, in holding that the substantive provisions of the ADEA are governed by established Title VII law and not by Equal Protection cases. Even assuming, *arguendo*, that proof of motive is not substantive but procedural, the appropriate analogy would be to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, from which the procedural provisions of the ADEA are derived and not to the Equal Protection Clause of the Fourteenth Amendment. *Lorillard* v. *Pons*, *supra* at 580. Proof of discriminatory motive is not required at all to establish a violation of the Fair Labor Standards Act.

Certiorari should be denied because there is no conflict in the Circuits on this issue, and because the Court of Appeals did not err in applying the Supreme Court's standards established in *Lorillard* v. *Pons, supra* and *Oscar Mayer & Co.* v. *Evans, supra.*

B. *Failure to Require Proof of Discriminatory Motive for the Disparate Impact Portion of this Case was Harmless Error and Would Not Affect the Actual Outcome of the Case Because Plaintiffs Below were Required to, and Did Successfully, Prove Discriminatory Motive as Part of Their Discriminatory Treatment Portion of the Instant Case.*

Plaintiffs below proceeded and prevailed on theories of both disparate impact and disparate treatment. Unlike disparate impact cases, proof of disparate treatment does require proof of discriminatory motive. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-06 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

In order to prevail on the disparate treatment theory plaintiffs were required to and did establish discriminatory motive. The jury verdict in favor of plaintiffs was based on extensive direct evidence of defendants' contemporaneous motivation for discharging Mrs. Geller in favor of a younger teacher. That evidence included testimony of the investigator from the state human rights agency regarding conversations with defendants held a few weeks after the incident, and on tape recorded conversations between Mrs. Geller and various defendants at the time the decision was made. The jury had ample evidence on which to base their verdict.

The instant case does not present a situation conducive to review of the issue of motive in a disparate impact case since plaintiffs in fact prevailed also under a disparate treatment

theory and review by this Court of the issue of motive under a disparate impact theory would not change the outcome of the case and would merely be an advisory opinion by the Court. Certiorari should not be granted on this issue.

C. *The Refusal of the Trial Court to Credit Statistical Proof was Based upon Findings of Fact Regarding the Lack of Credibility of Defendants' Statistical "Expert" and the Mathematical Incompetence of Defendants' Statistical Study which are Findings of Fact Inappropriate for Appellate Review.*

The ruling on statistical proof regarding the disparate impact theory in this case was based on the trial court's findings of credibility of the witnesses, an issue not normally reviewable on appeal. The Court has previously recognized that the usefulness of statistical proof depends on all the surrounding facts and should be left to the trial court for determination. *Hazelwood School District* v. *United States*, 433 U.S. 299, 312 (1977). Defendants offered evidence of the actual hiring pattern in an effort to rebut plaintiffs' statistical showing of discriminatory impact. The trial court's refusal to credit defendants' proof was based on three major flaws in their proof.

> The uncorroborated statistics offered in support of this (defendants') contention, however, were so defective as to justify the district court's refusal to give them any weight. They were prepared by a named defendant in the case, a former Personnel Director for the West Hartford schools who had no expertise as a statistician and had a direct interest in the outcome of the case.[1] He not only

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[1] In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 433 n.32 (1975), the Supreme Court recognized the problematic validity of statistics produced by such a source:

> failed to produce any competent evidence of the applicant pool for the periods, which is essential to a statistical determination of hiring patterns, but he employed such dubious analytical techniques as obtaining an overall percentage figure by averaging annual percentages for several different years, thus contravening the basic, well-recognized principle that such averaging by percentages produces meaningless and misleading results.

Opinion of the Court of Appeals, Appendix pages 21A-22A (footnote in original, parenthetical material added).

The court's finding that defendants' witness lacked credibility is not reviewable unless there had been abuse of discretion, which defendants here do not allege. The court's refusal to credit a hiring pattern study which fails to include competent evidence of either the applicant pool or a relevant labor pool follows the standard established by the Supreme Court in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). (Nor is plaintiff required to analyze the actual applicant pool, *Dothard* v. *Rawlinson*, 433 U.S. 321, 330-331 (1977), particularly where the data base records of actual applicant are so inaccurate and inadequate that they are not susceptible of reliable statistical analysis as was the situation in the instant case.) The court's refusal to credit a study performed by someone so abysmally ignorant of basic mathematics that he averages percentages is not the kind of error of law deserving of the Supreme Court's attention.

Defendant's claim here is that their "actual" hiring statistics rebutted plaintiffs' statistical study proving impact. The lower

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It cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene-oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care.

courts properly refused to credit defendants' statistics, and the issue is one of fact, not law. Nor should one Supreme Court grant certiorari to decide *if* the defendants had established competent statistical evidence of a hiring pattern, and *if* that evidence had shown no age discrimination whether that would rebut a disparate impact case. The Supreme Court does not grant certiorari to decide the outcome of hypothetical cases, and defendants are limited on appeal to the evidence actually introduced at trial. Their evidence was so defective that certiorari should not be granted.

D. *The Degree of Disparity Proved by Plaintiffs' Statistical Study was About Six Hundred (600) Times the Level Generally Required for Statistical Significance and Greatly Exceeds the Level of Statistical Significance Required by the Supreme Court in Previous Cases.*

The Supreme Court has previously affirmed findings of discriminatory impact based on statistical proof showing a level of disparity far below what was proved in this case. In *Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977), the Court held that disparate impact was established where the minimum height requirement excluded 33.29%, the minimum weight requirement excluded 22.29% of the protected class. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971), the high school diploma requirement excluded 34% of the protected class and was held sufficient to establish disparate impact.

The evidence of disparate impact presented at trial in the instant case far exceeds the level of impact held sufficient in *Griggs* and *Dothard*. Plaintiffs' statistical expert concluded that defendants' policy of excluding teachers with more than five years teaching experience excluded 92.6% of all teachers between 40 and 65 years old. His conclusion was that the association between age and years of experience was statistically

very significant, at about six hundred (600) times the level generally required for statistical significance. The chi square statistic, which measures the comparative exclusion between those within and outside of the protected class was 4688.3 with one degree of freedom. The Phi was .339. Plaintiffs' Exhibit 17, Table I at 4; Trans. of June 20 at 202-203 (Testimony of Dr. Alan Hunt).

Defendants did not impeach the credibility of Dr. Hunt's statistical study in any way. His qualifications were unquestioned, his data base was drawn from highly accurate fiduciary records kept by the State of Connecticut itself, and his statistical methodology was not questioned at all by defendants. As the trial court noted, plaintiffs' statistical study was "uncontraverted evidence." Opinion of the Trial Court, Appendix p. 2A.

Certiorari should not be granted to review plaintiffs' statistical proof where the level of disparity exceeds the standards previously approved in *Griggs* v. *Duke Power Co.*, *supra*, and *Dothard* v. *Rawlinson*, *supra*. Nor should certiorari be granted to allow defendants to contest for the first time on appeal evidence which was not contested at trial.

E. *Salary Cost is not a Cognizable Defense Justifying Employment Discrimination; Defendants Did Not Attempt to Introduce Evidence which Would Provide Factual Support for Such a Defense; and Plaintiffs Proved that the Bald Assertion of a Cost Defense Unsupported by any Evidence was in Fact a Pretext for Discrimination.*

Although budgetary constraints requiring that costs be cut are a widespread phenomena in contemporary society, those necessary cost cuts cannot be accomplished by excluding members of a protected class from employment. Cost cuts must be accomplished without invidious discrimination against older

workers. The Guidelines for the ADEA issued by the Secretary of Labor clearly state that generalized assertations that older workers are more costly to employ are contrary to the purposes of Congress in enacting the statute and cannot serve as a defense.

> a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation — an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

29 C.F.R. § 860.103(h) (1979).

Accord, *Laugeson* v. *Anaconda Co.*, 510 F.2d 307, 316 (6th Cir. 1975); *Marshall* v. *Arlene Knitwear, Inc.*, 454 F.Supp. 715, 728 and 730 (E.D. N.Y. 1978); *Coates* v. *National Cash Register Co.*, 433 F.Supp. 655, 661 (W.D. Va. 1977); *Bishop* v. *Jelleff Associates*, 398 F.Supp. 579 (D. D.C. 1974).

Unless defendants demonstrated that one of the other statutory exemptions applied, a generalized assertation of cost is not a sufficient defense. Defendants in this case have, for obvious reasons, not claimed that *less* experienced teachers are better teachers, nor have they alleged that youth is a bona fide occupational qualification for teaching. Defendants introduced no evidence whatsoever that any real or projected cost savings would result from their policy favoring younger teachers.

Furthermore, plaintiffs introduced evidence at trial that defendants already had in existence a separate policy which provided a less discriminatory alternative for achieving legitimate cost savings without any discriminatory effect on older teachers. West Hartford has had all along a second policy which provides that any teacher hired with more than nine years of experience will enter the salary schedule at the tenth step, Trans. of June 20 at 292-293 (Testimony of Personnel Director Richard Hedrick), but which does not preclude the hiring of older teachers. Where defendants have in place a mechanism for controlling costs which does not discriminate in hiring, an assertation unsupported by evidence that discrimination in hiring is required to save money constitutes a pretext for age discrimination.

Defendants cite no cases supporting their claim that cost is a legal defense to age discrimination. Certiorari should be denied on the grounds that the Court of Appeals did not err in ruling that defendants' cost defense failed both as a matter of law and because plaintiffs proved at trial that it was a pretext for age discrimination in hiring.

II. The Jury Instructions Taken as a Whole Correctly Explained the Appropriate Standard of Causation to the Jury; There is No Conflict among the Circuits; and the Jury's Verdict was Amply Supported by Evidence that the Key Factor in the Employment Decision was Illegal Age Discrimination.

The jury instructions in the instant case when taken as a whole correctly and fairly explained in some detail to the jury that defendants' policy of not hiring older teachers would be illegal only if the policy actually made a difference in defendants' decision. The trial court referred at least three separate times in the instructions to the fact that the policy had to

"make a difference", and carefully explained to the jury what this meant in terms of the actual case before the jury.

> She does not have to prove, that is Mrs. Geller doesn't, that the sixth step guideline was the only reason for the defendants' action. There could have been more than one reason for the defendants' decision about her employment, but she is nevertheless entitled to recover if one factor was her experience level and if it made a difference in determining whether she should be employed.
>
> If it did not make any difference, if it was not a reason that entered into the decision, then of course she has not proved her case. But if it did, then she has.
>
> She does not have to prove, as I said, that that was the sole reason. If it made a difference, that is the sixth step guideline, in the actual determination in this particular case, then she would be entitled to recover.

Jury Instructions, Trans. of June 22, 1979 at 630.

> So we call it a sixth step policy or guideline, but it is also related to economic savings as a guideline. Whether it was applied in this case, whether it made a difference, those are questions you are going to have to decide. Because if it did not, Mrs. Geller is not entitled to recover. Just because she is an older person does not mean she has the job. . . .
>
> So if you find by a preponderance of the evidence that one reason Mrs. Geller was not hired for a permanent teaching position was because of the sixth step guideline, then you will find that Mrs. Geller's rights under the Age Discrimination Act have been violated and that she is entitled to recover damages. If Mrs. Geller does not prove

> that that was one of the reasons, or that it made no significant difference in her not being hired, then she is not entitled to recover.

Jury Instructions, Trans. of June 22, 1979 at 632-33.

These instructions correctly applied standard of causation for ADEA cases as developed by the Sixth and First Circuits. In *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975), the court held that there could be more than one factor in the decision and that plaintiff could recover if one such factor was age and if it in fact made a difference. Accord, *Cova* v. *Coco-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978). The Second Circuit in this case correctly ruled that there is no real distinction between instructing the jury that age discrimination must be shown to have 'made a difference' and instructing the jury that 'but for' age discrimination the plaintiff would have been hired. Opinion of the Second Circuit, Appendix p. 26A. Where, for example, the plaintiff is independently unqualified for the job and was also discriminated against because of age, the defendants will prevail regardless of whether the language regarding causation is couched in terms of 'but for' causation or requiring that age 'made a difference.' The plaintiff's lack of qualifications will constitute an independent intervening cause precluding a 'but for' finding. Whatever age bias there was would not have 'made a difference' in the decision because the plaintiff simply was not qualified regardless of her age. Opinion of the Trial Court, Appendix p. 9A-10A.

The jury's verdict finding that age actually made a difference in West Hartford's decision is amply supported, since defendants themselves admitted to the state human rights agency's investigator that it was "the key factor" in their refusal to hire her. Trans. of June 19, at 12-13 and 15-16. (Testimony of David Metzger). Defendants never attacked Mrs. Geller's

qualifications as a teacher, and indeed admitted that she rendered "excellent service", comparing her to a Lincoln Continental but explaining that West Hartford had to settle for a Buick. Trans. of June 21 at 482 (Testimony of defendant Dr. Johnson). Defendants admitted that the reason Mrs. Geller was not hired was because of their policy favoring younger teachers.

In the context of such substantial evidence regarding defendants' major reason for the refusal to hire, the trial court's instruction that age must be shown to have made a difference is not reversible error. Certiorari should be denied.

III. Unless There is Reversible Error of Law in Both the Disparate Impact and Disparate Treatment Theories, Certiorari Should be Denied Because the Jury's Verdict will Stand and the Court's Action will Not Affect the Actual Outcome of the Case.

The Supreme Court does not issue advisory opinions nor answer hypothetical questions. *Muskrat* v. *United States*, 219 U.S. 346 (1911). If a lower court has erred as a matter of law but the reversal of the error will not affect the actual outcome of the case, the Court should decline to exercise discretionary jurisdiction.

Plaintiffs below proceeded and prevailed at the trial and appellate levels on two separate theories of employment discrimination: disparate impact and disparate treatment. Opinion of the Second Circuit, Appendix p. 24A-25A. Because the jury's verdict is based on both theories, any reversal of error of law as to one theory only will not overturn the jury verdict. Therefore certiorari should be denied.

IV. Attorney's Fees and Costs Incurred by Opposing the Petition for Writ of Certiorari Should be Awarded under the Statutory Authority of the Age Discrimination in Employment Act of 1967.

Award of costs and attorney's fees are specifically provided by the ADEA, 29 U.S.C. § 626(b), incorporating 29 U.S.C. § 216(b). "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." The Supreme Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render (that) award unjust" where a Congressional statute provides for recovery of attorney's fees in a civil rights case. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). The same standard has been applied by the Court to recovery of costs and attorney's fees under Title VII of the 1964 Civil Rights Act. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 412 (1975). Congress has emphasized its purpose to provide for recovery of costs and attorney's fees to prevailing plaintiffs in civil rights cases (rather than establish expensive enforcement bureaucracies at taxpayer's expense) in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), which was designed to achieve consistency in our civil rights laws. S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976); 5 U.S. Code Cong. & Ad. News 5908.

The compelling need for award of costs and attorney's fees as part of the overall scheme of federal enforcement of these statutes has been recognized by both the Supreme Court in *Newman* and by Congress. S. Report No. 1011, 94th Cong. 2d Sess. 1 (1976); 5 U.S. Code Cong. & Ad. News at 5910. As the Senate Report recognizes, the success of a privately as opposed to publically funded enforcement scheme rests upon the

ability of litigants to attract competent counsel assured of adequate fees if they prevail. The reasons which support award of costs and attorney's fees at the trial level are perhaps even more compelling where the plaintiff has prevailed at trial and the defendants seek appellate review.

There is a very real danger that defendants' attorneys, funded by insurance policies reimbursing their costs of litigation, will attempt to wear down prevailing but indigent plaintiffs by engaging in endless costly appeals. This increase to an already overburdened federal appellate docket is unnecessary. Failure to award attorney's fees, or award of purely nominal fees, will encourage such appeals by defendants and discourage prospective plaintiff's counsel from taking such cases, thus defeating the Congressional purpose in authorizing award of attorney's fees by statute.

The denial of certiorari in this case should be accompanied by an award of actual costs and reasonable attorney's fees as provided by the ADEA. Plaintiffs have attacked as Appendix A an affidavit of the normal billing rate and actual hours expended in opposing the petition for writ of certiorari.

V. Damages Not Exceeding Ten Percent Should be Awarded under U.S. Supreme Court Rule 56 Because There is No Ground for Granting such Writ and the Petition Appears to have been Filed for Purposes of Delay.

U.S. Supreme Court Rule 56(4) provides for an award of reasonable damages for delay where a petition for a writ of certiorari has been filed and there appears no ground for granting such a writ. Where the appeal is filed primarily for purposes of delay and nothing in the record tends to show error below or rebuts the conclusion that the major purpose was delay, damages should be awarded. *Walker* v. *Dreville*, 79 U.S. 440 (1871).

Defendants in this case have attempted to appeal primarily on questions of fact unsuitable for appellate review, such as their allegations of error regarding the statistical proof. Those issues of law raised are clearly frivolous such as their claim that Constitutional standards for motivation under the Equal Protection Clause should be applied to a Congressional statute. Defendants could not in fact reasonably believe that this case is likely to be accorded Supreme Court review.

A real injury to plaintiffs for delay in this case is because the statutory interest rate provided for judgments pending appeal is only eight percent, and defendants obviously gain an economic advantage in delaying the day of payment as long as possible. To permit utilization of the appellate dockets to avoid payment and for defendants to benefit from unreasonably low interest rates is not in the interests of either the federal judiciary or plaintiffs. Reasonable damages should be awarded to remove the economic advantage defendants have received as a result of the delay during the process of seeking certiorari.

Summary.

This case is not suitable for Supreme Court review because many of the allegations of error are really challenging findings of fact at the trial level, including defendants major contention regarding the statistical proof of disparate impact, the proof that the cost defense was in fact a pretext for age discrimination, and the jury verdict that age bias was the determining factor causing defendants to refuse employment to plaintiff. Of the three arguable errors of law, one is clearly frivolous. Defendants' contention that Equal Protection motivation standards should be applied to the ADEA has no basis whatever in law, defendants cite no cases supporting this

proposition and it contradicts previous Supreme Court decisions. The second, defendants' contention that cost is a defense, has never been accepted by any court and defendants cite no cases in support of this proposition. Furthermore, evidence was introduced proving that cost was a pretext for age discrimination and the jury's verdict in favor of plaintiff constitutes a factual determination unsuited for appellate review. The third, defendants allegation of error in charging the jury on causation does not in fact present a situation where the Circuit Courts are in conflict and the jury verdict was amply supported by evidence showing the real reason defendants refused to hire plaintiff was their illegal policy of age discrimination. Finally, unless there is reversible error in both the disparate impact and disparate treatment portions of the case, certiorari should be denied because Supreme Court review will not affect the actual outcome of the case.

Plaintiffs seek award of costs and attorney's fees for opposing the petition for writ of certiorari as provided by the ADEA which should be awarded to further Congress' purpose in establishing a scheme of private enforcement. Plaintiffs also seek damages under U.S. Supreme Court Rule 56 to prevent defendants from receiving unfair economic benefit from filing a petition for purposes of delay.

Respectfully submitted,

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February 16, 1981.

Appendix A.

Affidavit of Attorney's Fees.

In accordance with the statutory provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) incorporating 29 U.S.C. § 216(b), authorizing award of attorney's fees to prevailing plaintiffs, the actual number of hours expended by plaintiffs' attorneys in opposing the petition for writ of certiorari are as follows:

Elizabeth K. Spahn	19 hrs. @ $75.00/hr.	$ 1,425.00
Gary J. Mena	2 hrs. @ $50.00/hr.	100.00
	TOTAL	$ 1,525.00

I hereby certify that the foregoing is a true and accurate representation of normal billing rates and actual time expended in opposing the petition for certiorari.

Respectfully submitted,

Date: February 16, 1981

s/_____

Elizabeth K. Spahn,
Attorney for Plaintiff